Supreme Court, U.S.
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Supreme Court No.

UNITED STATES SUPREME COURT

1995 Term

RICKY A. WHITE,

Petitioner,

vs.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, and OFFICER BLANCHARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM AN OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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63 pp

QUESTION PRESENTED

Whether, in light of this Court's decision in Johnson v. Jones, 115 S.Ct. 2151 (1995), the Sixth Circuit Court of Appeals had jurisdiction to hear an immediate appeal of the trial court's order denying summary judgment on the respondents' Rule 56(c) motion where respondents raised the issue of qualified immunity and where the trial court found that the record sufficiently supported genuine issues of material fact which precluded summary judgment.

PARTIES

The petitioner is the plaintiff in a 42 USC § 1983 action against the respondents alleging the use of excessive force during the course of an arrest.

The respondents, R. Harmon, R. Clewett and Officer Blanchard are each police officers for the Defendant City of Taylor. The City of Taylor was not a party to the appeal in the Court of Appeals.[1]

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[1] See Sixth Circuit Order, 8/31/95, Appendix p. A-2.

TABLE OF CONTENTS

QUESTION PRESENTED 2

PARTIES 3

TABLE OF CONTENTS 4

TABLE OF AUTHORITIES 5

REFERENCE TO OPINIONS 6

JURISDICTION 7

STATUTES INVOLVED IN THIS CASE . . . 8

STATEMENT OF THE CASE 9

AMPLIFICATION OF ARGUMENT FOR ALLOWANCE OF WRIT 16

APPENDIX 20

Court of Appeals Order Entered 8/31/95 . . . . . A-1

District Court Order Entered 4/14/94 . . . . . A-15

Letter from Court of Appeals dated 6/26/95 . . . . A-42

TABLE OF AUTHORITIES

STATUTES

28 USC § 1254(1) 7

28 USC § 1291 8

42 USC § 1983 . . . . . 3, 9

28 USC § 1441 9

28 USC § 1331. 9

CASES

Johnson v. Jones
115 S. Ct. 2151 (1995) . . 2, 11, 12, 14, 15, 16, 19

RULES

FEDERAL RULE OF CIVIL PROCEDURE 56(c) . . . 8, 10, 14, 16, 17

SUPREME COURT RULE, 10.1(C) . . . 16, 17

REFERENCE TO OPINIONS

1. Sixth Circuit Court of Appeals Opinion, No. 94-1456, August 31, 1995 (Contie, Ryan, and Suhrheinrich, Circuit Judges). **THIS IS THE ORDER THAT PETITIONER SEEKS TO APPEAL.**

2. U.S. District Court (E.D. Mich) Opinion and Order Denying Defendants' Motion for Summary Judgment, No. 93-17933, April 14, 1994, (Judge Paul V. Gadola).

JURISDICTION

On August 31, 1995 the Sixth Circuit Court of Appeals filed its opinion in the instant case reversing, in part, the trial court's denial of summary judgment as to two of the police officer respondents. Petitioner seeks to appeal this order.

The Jurisdiction of the Supreme Court is based upon 28 USC § 1254(1) which provides that the Supreme Court may review cases in the Court of Appeals "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED IN THE CASE

28 USC § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

FEDERAL RULE OF CIVIL PROCEDURE 56(c)

The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

This case was originally brought in Wayne County Circuit Court, State of Michigan, alleging, *inter alia*, violation of the United States Constitution's 4th Amendment and 42 USC § 1983 based upon the use of excessive force by the defendant officers during the course of an arrest.[2] The case was removed by the defendants to the United States District Court, Eastern District of Michigan under 28 USC § 1441, invoking the court's federal question jurisdiction of 28 USC § 1331. Federal jurisdiction was not disputed.

On December 6, 1993, all defendants moved for summary judgment pursuant to

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[2] It is undisputed that petitioner was attacked and severely injured by a police dog on a leash after petitioner had been arrested and handcuffed.

Rule 56(c) of the Federal Rules of Civil procedure raising the issue of qualified immunity. Plaintiff filed a response and defendants filed a further reply.

On April 14, 1994 the trial court filed a written opinion and order denying the defendants' motion for summary judgment. The opinion of the district court held,

> For the foregoing reasons, the court finds that the reasonableness of the officers' actions in waiting for the dog to find plaintiff after plaintiff had already been arrested and subdued is a genuine issue of material fact that precludes summary judgment.

See Appendix p. A-35.

The individual respondents filed an application for leave to appeal the trial court's denial of their motion in the Sixth Circuit Court of Appeals on the grounds that the trial court's denial of

a motion for summary judgment where qualified immunity had been raised was immediately appealable. The Sixth Circuit granted leave.

During the pendency of the appeal, the Supreme Court decided the case of Johnson v. Jones, 115 S.Ct. 2151 (1995).

In Johnson, upon underlying facts similar to those in the case at bar, this court held,

> For these reasons, we hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson v. Jones, 115 S. Ct, at 2159. It was precisely upon the existence of a genuine issue of material fact supported by the record that the trial court here denied the defendants' summary judgment

motion. Pursuant to Johnson the district court's order was not immediately appealable.

Prior to oral argument the Sixth Circuit requested that the parties be prepared at oral argument to address the effect, if any, of the Johnson v. Jones decision upon respondents' appeal. See Appendix p. A-42. At oral argument, petitioner argued that Johnson was on point and virtually identical in the question presented, and that, as a result, the district court's order in the instant case was not immediately appealable and was therefore not within the jurisdiction of the court of appeals.

Notwithstanding the Supreme Court's ruling in Johnson, the Sixth Circuit exercised jurisdiction over the case and

issued an order reversing the trial court's denial of summary judgment as to two of the respondents and precisely attacking the trial court's factual determination that the record contained sufficient support for finding a genuine issue of material fact.[3] The court of appeals clearly disregarded the trial court's weighing of the evidence submitted and argued during the trial court proceedings. The appellate court then speculated wildly as to the subjective intent and the knowledge of defendants Harmon and Blanchard, and based upon that speculation reversed the

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[3] The Court of Appeals reversed the trial court's denial of summary judgment as to respondents Harmon and Blanchard and affirmed as to Respondent Clewett on the grounds of qualified immunity. The court declined to address the respondents other arguments as not appealable since they were not final orders. See Appendix p. A-14.

trial court's denial of summary judgment as to those two defendants. See Appendix p. A-12.

In declining to exercise jurisdiction over that portion of the defendant's appeal based upon collateral estoppel, the court of appeals order makes a specific finding that the district court's order in that regard is not immediately appealable. The court of appeals' opinion specifically cites to Johnson in that regard. See Appendix p. A-13. However, the court's decision with regard to the non-appealability of the denial of defendants' rule 56(c) motion for summary judgment raising the immunity issue conflicts directly with the decision of the Supreme Court in Johnson. The issue of the non-appealability of such decisions was the gravamen of the

Johnson case.

It is worthy of note that in the Johnson opinion, the Supreme Court carefully pointed out the conflict in the circuit courts of appeals on the issues of appellate jurisdiction and the immediate appealability of the kinds of orders at issue here. The position of every circuit, except the Sixth and Eleventh circuits, are referenced in the opinion. Johnson, 115 S.Ct. at 2154. Petitioner must conclude that the Sixth Circuit has not previously ruled upon the issues here presented since the Supreme Court makes no reference to a position of the Sixth Circuit in what is otherwise a fairly complete mapping of the courts of appeals on this issue.

The Sixth Circuit brought this issue squarely before it for consideration by

requesting that the parties address the effect upon the instant appeal of the Johnson decision. See Appendix p. A-42. Notwithstanding the Johnson decision the court assumed jurisdiction and then promptly ruled in a manner that was diametrically opposed to the Supreme Court's ruling. The Sixth Circuit either missed the point or ignored the point of the Supreme Court's ruling in Johnson.

This court should grant certiorari to correct the Sixth Circuit's non-conforming decision on the issue of the immediate appealability of denials of rule 56(c) summary judgment motions involving qualified immunity defenses.

AMPLIFICATION OF ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

Rule 10.1(c) of the Supreme Court Rules, Consideration Governing Review on

Writ of Certiorari, provides guidance on the type of controversy the court will consider when deciding whether to grant certiorari. Rule 10.1(c) counsels that the Supreme Court will consider granting a writ of certiorari,

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

In the instant case the decision of the Sixth Circuit Court of Appeals is in direct conflict with a decision of the Supreme Court on the issue of the immediate appealability of certain denials of summary judgment under Rule 56(c) where immunity has been raised by the defendants. The Sixth Circuit opinion is also in conflict with the

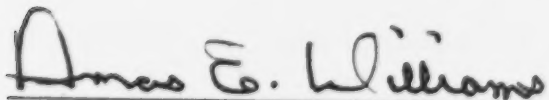
Supreme Court's decision on the closely related and equally significant issue relating to the jurisdiction of the appellate courts to hear such interlocutory appeals.

The issue of jurisdiction of the court of appeals is one of immense significance standing alone. However, when coupled with the issue of the immediate appealability of Rule 56 summary judgment denials involving the defense of qualified immunity the problem reaches far greater proportions because of the shear number of such appeals. It is reasonable to assume that in virtually every case alleging public official misconduct, the defense of immunity will be raised by the defendants and a motion for summary judgment will be filed as a matter of course.

The Sixth Circuit Court of Appeals was without jurisdiction to hear the appeal in this case because, based upon the Supreme Court's decision in Johnson, the order appealed from was not an immediately appealable order.

This court should grant certiorari to insure that the United States Court of Appeals for the Sixth Circuit conforms to the clear dictates of the Supreme Court's decision in Johnson v. Jones.

RESPECTFULLY SUBMITTED,
AMOS E. WILLIAMS, P.C.



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Dated: November 22, 1995

APPENDIX

CONTENTS

Court of Appeals Order
Entered 8/31/95 . . . . . A-1

District Court Order
Entered 4/14/94 . . . . . A-15

Letter from Court of Appeals
dated 6/26/95 . . . . . A-42

No. 94-1456

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY A. WHITE,

Plaintiff-Appellee,

v.
RONALD HARMON; RONALD CLEWETT;
District of Michigan.
and KEITH BLANCHARD,

Defendants-Appellants.
_____/

BEFORE: CONTIE, RYAN, and SUHRHEINRICH, Circuit Judges

RYAN, Circuit Judge. The plaintiff, Ricky White, brought this 42 U.S.C. § 1983 action against the defendants and the City of Taylor, alleging that the individual defendants used excessive force in arresting him and that the City of Taylor's failure to train the officers resulted in their use of excessive force. The district court entered summary judgment for all

defendants.

The individual defendants appeal from the district court's denial of their motions for summary judgment on the basis of qualified immunity and on the basis of collateral estoppel or issue preclusion. Although the briefs are written as though the City of Taylor were an appellant, no claim of appeal was filed by the City of Taylor in this case. The City's petition for leave to appeal, filed separately, was denied by this court in an order entered June 21, 1995.

We affirm the denial of summary judgment on qualified immunity as to Officer Clewett; reverse the denial of summary judgment on qualified immunity as to Officers [2] Harmon and Blanchard; and decline to exercise appellate jurisdiction over the defendants' appeal

of the denial of summary judgment on the basis of collateral estoppel or issue preclusion.

I.

In the early morning hours of April 30, 1991, Officers Mize and Blanchard of the Taylor police force were investigating two abandoned automobiles believed to be stolen. During the inspection, the officers noticed two other cars approaching on the road. The approach was suspicious--the two cars alternately started and stopped, started and stopped. The officers already suspected that the location was a drop-off point for stolen vehicles, so Mize and Blanchard followed the two cars.

Blanchard pulled over the car being driven by Isaac Rickles, determined that Rickles was driving with a suspended

license, and arrested him. Mize followed the plaintiff, Ricky White, into a driveway. White exited the car he had been driving and knocked on the door of the house nearby. He then went around the side of the house, jumped over a fence, and fled. Mize observed that the engine of the car White had driven was running without keys in the ignition and that the steering column was damaged. Mize radioed for assistance.

Officer Harmon responded to the request for assistance. Harmon spotted White running and unsuccessfully ordered White to stop. Eventually, Harmon found the plaintiff in a field, tackled him to the ground, and handcuffed him. Blanchard arrived on the scene, and the two officers began to drag White to the police car. After dragging White about

fifty yards, they contacted Officer Clewett, the canine handler, by radio to inform him that the suspect had been apprehended. According to Harmon, Clewett "told" them ⊥[3] not to remove the plaintiff until the canine finished the track. When Clewett and the dog arrived, Blanchard and Harmon yanked White to his feet. As White stood up, the dog bit his right elbow. Clewett ordered the dog to stop. Harmon examined the plaintiff's bleeding arm and determined that White required medical attention at a hospital.

On March 11, 1993, the plaintiff brought an action in Michigan state court, alleging state law causes of action in addition to a § 1983 cause of action. The defendants removed to federal court, but the district court remanded the state causes of action. For

the remaining § 1983 claim, the plaintiff alleged that the individual officers violated the Fourth Amendment bar against unreasonable seizures by using excessive force in arresting him. In addition, the plaintiff alleged that the City of Taylor was deliberately indifferent to his rights by inadequately training Clewett and the dog.

During discovery, White deposed Clewett who testified that the City had not provided him any canine-handling training aside from handing him some unspecified written policy. Remarkably, the defendants' counsel did not ask Clewett any questions for clarification. In addition, the defendants proffered no evidence explaining the training, if any received by the police dog. At oral argument, the defendants' counsel

asserted that both the canine handler and the dog are "certified," but the record below does not disclose that either Clewett or the dog had received any "tracking" training.

The individual defendants moved for summary judgment on the ground of qualified immunity. The City moved for summary judgment, claiming that the plaintiff's evidence did not establish deliberate indifference. All defendants moved for summary judgment on the basis of collateral estoppel; White's state law claims had been rejected by a Michigan ⊥4 state court and jury. The district court denied the motions. The individual defendants now appeal.

II.

A.

Because the defendants claim

qualified immunity for their actions, the relevant question is the "'objective legal reasonableness' of the action[s] ...assessed in light of the legal rules that were 'clearly established' at the time it was taken.'" Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citations omitted). That is "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. at 640.

The right claimed to be violated here is the plaintiff's Fourth Amendment right to be free from unreasonable seizures, specifically to be free from excessive force during the course of an arrest. Whether a seizure involved excessive force depends on the "objective reasonableness" of the seizure (not to be

confused with the "objective legal reasonableness" term used to describe qualified immunity).

> "[A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure,'" should be analyzed under the Fourth Amendment's "objective reasonableness" test.

Matthews v. Jones, 35 F.3d 1046, 1050 (6th Cir. 1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). This test

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

[5] Graham, 490 U.S. at 396. We judge the "reasonableness" of the officer's use of

force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. Accordingly, the question here as to each individual defendant is whether (as to the qualified immunity aspect) a "reasonable official would understand that what he" did constituted (as to the excessive force aspect) an "objectively [un]reasonable" seizure.

We conclude that, based on the existing record, Officer Clewett is not entitled to qualified immunity. Viewing the evidence in the light most favorable to the plaintiff, Clewett requested, for no apparent reason, at least no reason found in the record, that other officers postpone taking the plaintiff away so that he could bring a little-trained canine to the arrest scene. Clewett, who

himself had virtually no canine-handling training, then brought the dog, which Clewett knew had bitten someone on a previous occasion, into the immediate presence of the handcuffed plaintiff the dog was "tracking"; close enough to permit the dog to bite the plaintiff. A reasonable officer would understand that those facts constitute an objectively unreasonable seizure. The district court properly denied Clewett's motion for summary judgment.

However, the district court should have granted Harmon and Blanchard's motions. The record shows that these two officers were "told" by Clewett not to remove the plaintiff until the dog finished the track. There is no evidence that Blanchard knew that the City had failed to train Clewett and the dog. A

reasonable official would not understand that it was objectively unreasonable to heed Clewett's request. As far as Blanchard knew, Clewett and the dog were adequately trained. Similarly, although Harmon knew that some written canine policy exited, he did not know the policy's content, and the ⊥[6] evidence does not show that Harmon knew how little training Clewett and the dog received. Harmon did know of one other biting incident involving Clewett's dog, but that knowledge does not render unreasonable Harmon's decision to wait for Clewett and the dog to appear. Accordingly, the district court should have entered summary judgment for Harmon and Blanchard on the basis of qualified immunity.

B.

The district court's order denying summary judgment on the basis of collateral estoppel or issue preclusion is not an independently final, appealable order under 28 U.S.C. § 1291. In order to decide this issue, we would have to exercise pendent "issue" appellate jurisdiction, and there is no reason to do so. The denial of summary judgment on issue preclusion grounds is neither "inextricably intertwined" with the appealable qualified immunity judgment nor necessary in order to ensure "meaningful review" of the qualified immunity judgment. See Swint, et al. v. Chambers County Comm'n, et al., 115 S. Ct. 1203 (1995); see also Johnson v. Jones, 115 S. Ct 2151 (1995). We decline to exercise jurisdiction over this aspect

of the district court's order.

III.

To summarize, we **AFFIRM** the denial of summary judgment on qualified immunity as to Officer Clewett; **REVERSE** the denial of summary judgment on qualified immunity as to Officers Harmon and Blanchard; and **DECLINE** to exercise pendent "issue" appellate jurisdiction over the defendants' appeal on the basis of issue preclusion and **DISMISS** this aspect of the appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY A. WHITE,

Plaintiff,

v.

CITY OF TAYLOR, R. HARMON, R. CLEWETT, OFFICER BLANCHARD, jointly and severally,

Defendants.
_____/

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On December 6, 1993, defendants filed the instant motion for summary judgment. Plaintiff filed a reply December 28, 1993. On February 17, 1994, defendants filed a reply. Discovery closed in this case November 19, 1993. Oral argument was heard April 6, 1994.

I. Facts

At approximately 7:30 a.m., April 30, 1991, plaintiff was arrested by

defendants on a charge of Unlawfully Driving Away an Automobile.[1] According to the police reports submitted by defendants in support of their motion for summary judgment, at 5:30 a.m. on April 30, 1991, Officers Mize and Blanchard were on Breast ⊥[2] Road investigating two abandoned vehicles they believed had been stolen when they saw other two vehicles: one, a blue Firebird driven by plaintiff, and the other a black GM pickup truck

[1] What occurred on the evening prior to plaintiff's arrest is a matter of dispute between the parties. Defendants claim that plaintiff stole a car, although the charge against him was dismissed when defendants failed to produce certain witnesses. Plaintiff claims that the car was stolen by his friend, Isaac Rickles, without his assistance or knowledge. Although what happened the night before does not appear to the court to be relevant to the issue raised by plaintiff's complaint, the court will assume for purposes of this motion that plaintiff's version of the facts is true and accurate.

driven by plaintiff's friend Isaac Rickles. The officers became suspicious when they observed the vehicles repeatedly starting toward them and then stopping.[2]

The officers split up: Officer Blanchard pulled over Rickles and, after learning that he was driving with a suspended license, arrested him; Officer Mize followed plaintiff and saw him pull into a driveway. Plaintiff exited the Firebird and knocked on the door of the house. Plaintiff then went around the side of the house and jumped a fence. Mize checked the car plaintiff had been

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[2] The officers suspected that the area was a drop-off point for stolen vehicles. They believed the two stolen vehicles they were investigating had been dropped off within the last twenty minutes. They therefore thought it possible that plaintiff and Rickles were in the area to drop off another stolen vehicle.

driving; he found that the car had steering column damage and that the engine was running without keys in ignition. Officer Mize then radioed for assistance, indicating over the radio that plaintiff was suspected of driving a stolen vehicle.

Responding to Officer Mize's radio transmission, a third officer, Officer Harmon, began searching for plaintiff. Upon arriving at the area where plaintiff reportedly was, Harmon spotted plaintiff running into the woods. Harmon shouted at plaintiff from a distance of 25 or 30 feet to halt; plaintiff turned and looked at Harmon and then ran faster in the other direction. Harmon chased plaintiff with the patrol car for some time before finally finding [3] him in a field, tackling him and handcuffing him. As

Mize caught plaintiff, Officer Blanchard arrived at the scene.

After handcuffing plaintiff, Officers Harmon and Blanchard began dragging plaintiff to the police car. They had dragged him about 50 yards to a location near the patrol car, when they decided to wait there until the police dog had finished its track of plaintiff. After the dog had arrived, plaintiff was lifted to his feet by Officers Mize and Blanchard. As plaintiff attained a standing position, the dog grabbed hold of his right elbow and began pulling on it with his teeth. Officer Clewett told the dog to heel and it responded. Officer Harmon examined plaintiff's arm and saw that it was injured and bleeding. Plaintiff was then transported to the hospital for medical treatment.

At his deposition, Officer Clewett testified that the City of Taylor provided him with no formal training in the handling of police dogs other than to hand him some written policies. He further testified that he is not aware of any policy of the City of Taylor that requires any prisoner injuries to be reported or investigated, including injuries caused by the police dogs. Finally, Officer Clewett testified that he knows of only two incidents of police dog bites in the City of Taylor: those are plaintiff's injury and one other. Both bites were incurred by the same dog (a dog named Beau) while it was under the supervision of Officer Clewett.

On March 11, 1993, plaintiff filed a complaint in Wayne County Circuit Court alleging state and federal law claims.

Defendants ⊥[4] removed the action to this court on May 6, 1993. Exercising its discretion to retain or remand pendent claims, the court remanded Counts I and III which allege only state law claims and retained Counts II and IV which allege, respectively, a claim under 42 U.S.C. § 1983 and a claim for exemplary damages.

In Count II, plaintiff alleges that defendants violated his constitutional right to be free from unreasonable search and seizure, the right to be free of excessive force, and the right to due process.[3] Specifically, plaintiff

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[3] Although it is unclear from the complaint, it may be that plaintiff has included both the Fourth Amendment search and seizure claim and the due process claim as part of his excessive force claim. The court nevertheless addresses the issue of probable cause in subsection C of this opinion, because defendants argue it in their motion and

alleges that

> [d]efendant's [sic] permitted a police dog to bite Plaintiff on his right elbow at a time when Plaintiff was handcuffed [and that] [t]he conduct of allowing Plaintiff to be bitten by a police dog at a time when Plaintiff was completely subdued and in the complete control of the officers was grossly negligent.

Complaint at Para. 12 and 14.

Defendants bring their motion for summary judgment under Fed. R. Civ. P. 56, claiming that plaintiff has no evidence to support his section 1983 claim.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, deposition, answers to

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because plaintiff's response does not specifically identify it as a non-issue.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ⊥[5] any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citation omitted). The Court must view the evidence in a light most favorable to the nonmovant as well

as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v

Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); Gregg, 801 F.2d at 861. [6]

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986),

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); see also Celotex, 477 U.S. at 322-23; Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). Anderson, 477 U.S. at 250. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission of the issue to the jury. Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 (E.D. Mich. 1990), aff'd, 929 F.2d 701 (6th Cir. 1991). The evidence itself need not be the sort admissible at trial. Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. Id.

III. Analysis

A. Liability of the Municipality

In order for the City of Taylor to be held liable under section 1983, plaintiff must show that the alleged injury was inflicted pursuant to governmental custom, policy, or practice. Monell v. Dep't of Social Services, 436 U.S. 658, 694 (1978). [7] Under certain circumstances, a municipality can be held liable in section 1983 action for constitutional violations resulting from its failure to train municipal employees. City of Canton v. Harris, 489 U.S. 378, 392 (1989). More specifically, inadequacy of police training may serve as a basis for municipal liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into

contact. Id.

In the instant case, plaintiff presents the deposition of Officer Clewett stating that the City of Taylor offered him no training in the handling of police dogs other than to issue a handbook of written policies. Defendants offer no submission of the City's written policies and make no argument that they are sufficient training for the dog handlers. Because those who come into contact with police dogs can be very seriously injured,[4] it is possible that a trier of fact could find that the City's failure to train demonstrates a deliberate indifference to the rights of those persons. The court therefore finds

[4] In fact, the court is aware of at least one instance in which a police dog killed a suspect by biting him in the neck. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988).

that there remains a genuine issue of material fact as to the adequacy of the City's training of officers who handle dogs.

B. Qualified Immunity of the Officers

The doctrine of qualified immunity shields government officials from civil liability for damage they cause in the course of performing discretionary functions, provided "their conduct does not violate clearly established statutory or constitutional rights

[8] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When a defendant raises a qualified immunity argument in a motion for summary judgment, the plaintiff must satisfy a two-prong test: "First, the allegations must state a

claim of violation of clearly established law. Second, the plaintiff must present evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts." Russo v. City of Cincinnati, 953 F.2d 1036, 1043 (6th Cir. 1992) (citations omitted).

The use of excessive force by police officers gives rise to a section 1983 action. Tennessee v. Garner, 471 U.S. 1, 8 (1985). All claims that law enforcement officials have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other seizure of a free citizen must be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a substantive due process

approach.[5] Graham v. Connor, 490 U.S. 386, 388 (1989). Whether the force used by the officers in arresting plaintiff was excessive, and thus violative of clearly established law, turns upon whether their actions were objectively reasonable under the circumstances. Id. at 397.

Defendants argue that they are protected by the doctrine of qualified immunity because there is no evidence that defendants intentionally caused the police dog to bite plaintiff. Defendants claim that the dog bite was accidental and that Officer Clewett,

[9] the dog handler, immediately called the dog off of plaintiff. It is the law,

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[5] Thus, if plaintiff intended his due process allegation as part of his excessive force claim, the due process claim fails.

however, that negligence on the part of police officers in the apprehension and arrest of suspected criminals may form the basis of an excessive force claim. Pleasant v. Zamieski, 895 F.2d 272, 275-76 (1990) (accidental shooting of suspect by police is subject to review under objectively reasonable standard). The reasonableness test is an objective standard to be applied "without regard to the [officers'] underlying intent or motivation." Id. at 276, quoting Graham, 490 U.S. at 397. Thus, plaintiff need make no allegation that the officers specifically intended for the dog to bite him.

In the instant case, then, the question is whether it was objectively reasonable for the officers to allow the dog to complete the tracking of plaintiff

even though plaintiff was already in custody and completely under the officers' control.[6] Defendants offer no explanation as to why they waited for the dog to finish the tracking.[7] Plaintiff argues that there were no reasonable grounds for allowing the dog to approach him. Plaintiff also points out that the officers knew of the dog's propensity to

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[6] There is some dispute among the defendants and between defendants and plaintiff as to whether plaintiff was struggling with the officers at this point. Some of the defendants testified that plaintiff was struggling, others that he was not. Plaintiff claims he was not struggling. However, none of the officers claim that the dog was employed because plaintiff was struggling. Thus, it is unclear what import, if any, this dispute carries. Moreover, for purposes of this motion, the court must view the evidence in a light most favorable to plaintiff.

[7] Perhaps there is a technical benefit to doing so, such as to maintain the training of the dog. However, without any explanation by defendants, one can only speculate.

⊥[10] bite because he had bitten a suspect before while under the control of Officer Clewett. Based on this previous behavior of the dog, it was foreseeable on the part of defendants that plaintiff would be bitten if the dog were allowed near him.

At his deposition, plaintiff testified that he did not see the dog prior to its biting him and that he did not know the dog was there until it bit him. He further testified that he did not hear or see any of the officers direct the dog to attack him or direct the dog to stop attacking him. Thus, the reasonableness of the officers' actions must be evaluated by reviewing other evidence such as the testimony of the officers, or the testimony of an expert as to the reasonable procedure with

respect to the use of dogs after a suspect has been apprehended, arrested and subdued.

For the foregoing reasons, the court finds that the reasonableness of the officers' actions in waiting for the dog to find plaintiff after plaintiff had already been arrested and subdued is a genuine issue of material fact that precludes summary judgment.

C. Probable Cause to Arrest Plaintiff

In their motion for summary judgment, defendants argue that the record clearly indicates that the police officers had probable cause to arrest plaintiff. Though the complaint alleges that defendants violated plaintiff's right to be free from unlawful search and seizure,[8] plaintiff offers no factual or

[8] See footnote 3.

legal argument rebutting defendants' version of the events that led up to his [11] arrest.

An arrest without a warrant may validly be made provided that the arrest is supported by probable cause. Gerstein v. Pugh, 420 U.S. 103, 113 (1975). Probable cause which will justify an arrest without a warrant exists where the facts and circumstances are sufficient in themselves to warrant a reasonable belief that an offense has been or is being committed by the person to be arrested. Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979).

In the instant case, just prior to plaintiff's arrest Officers Mize and Blanchard were investigating two abandoned vehicles which they believed had been stolen. They further believed

that the area was a drop-off point for stolen cars. Seeing two cars stopping and starting as the drivers approached the suspected drop-off point, at 5:30 a.m., the officers understandably became suspicious.

Officer Mize surveyed plaintiff's actions. When the officer looked into the vehicle plaintiff had been driving, he saw steering column damage and no keys in the ignition of a running vehicle. These facts corroborated Mize's initial suspicion that the vehicle was stolen.

Officer Harmon, who ultimately was responsible for plaintiff's arrest, was relying on Mize's radio report which gave a description of plaintiff and stated that he was suspected of driving a stolen vehicle. When Officer Harmon spotted plaintiff on foot, Harmon told plaintiff

to halt but plaintiff fled.

These facts clearly support the officers' belief that plaintiff had committed the crime of driving a stolen vehicle. [12] Thus, the court finds that any claim by plaintiff that he was arrested without probable cause must fail.

D. Effect of State Court Proceedings on the Federal Action

In their reply to plaintiff's response, defendants argue that because the remanded state court claims of plaintiff were ultimately decided in defendants' favor, that defendants are entitled to judgment on plaintiff's Count II under the doctrine of res judicata. Defendants claim that the state court judge used a federal law jury instruction in instructing the jury on the issue of plaintiff's excessive force claim brought

under Michigan law.

In non-=diversity cases in federal court, federal collateral estoppel rules apply in determining the effect of a prior judgment. Gambocz v. Velencsics, 468 F.2d 837, 841 n.4 (3d Cir. 1972). The court's jurisdiction over this case arises under 42 U.S.C. § 1983. Therefore, federal collateral estoppel rules apply.

Before a court may apply collateral estoppel to bar litigation of an issue, four specific requirements must be met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
>
> (2) determination of the issue must have been necessary to the outcome of the prior proceeding;
>
> (3) the prior proceeding must have resulted in a final

judgment on the merits; and

> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers' Ass'n, 821 F.2d 328, 330 (6th Cir. 1987) (emphasis added). The issue of [13] excessive force under Michigan constitutional law raised in the state court action between plaintiff and defendants may have been similar to the issue before this court. However, it was not "the precise issue raised in the present case." Thus, the court cannot find that plaintiff is estopped from litigating his federal law claim.

For the foregoing reasons, defendants' motion for summary judgment shall be **DENIED**.

ORDER

Therefore, it is hereby **ORDERED** that defendants' motion for summary judgment is **DENIED.**

SO ORDERED.

Dated: 4/14/94

/ s /
PAUL V. GADOLA
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEONARD GREEN
CLERK

TELEPHONE
(513)684-2953
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June 26, 1995

Gina U. Puzzuoli, Esq.
Amos E. Williams, Esq.

Re: No. 94-1456
Ricky A. White v. R. Harmon, et al.

Dear Counsel:

As you have previously been advised, this appeal is scheduled for oral argument on July 24, 1995.

You should be prepared to address at argument the effect on this case, if any, of the June 12, 1995 decision of the U.S. Supreme Court in *Tyson Johnson, et al. v Houston Jones*, 63 LW 4552.

Very truly yours,

/ S /

Leonard Green, Clerk

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